77-1858

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

[redacted]

MARIA ALANIZ, et al.,
Plaintiffs-Respondents,

vs.

TILLIE LEWIS FOODS, et al.,
Defendants-Respondents,

vs.

ROBERT BEAVER, et al.,
Applicants-Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR TILLIE LEWIS FOODS, ET AL. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 572 F.2d 657 (9th Cir. 1978). The district court has issued three opinions of which only one, reported at

73 F.R.D. 289 (N.D.Cal. 1976), pertains tc the instant petition. *See also,* 73 F.R.D. 269; ..... F.R.D. ....., 13 FEP Cases 738.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1978. A petition for rehearing was denied on April 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the circuit court properly found that the district court did not abuse its discretion in denying petitioners' motion to intervene after a judgment approving a consent decree in a suit alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1866.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e, *et seq.*), the Civil Rights Act of 1866 (42 U.S.C. §1981), and Federal Rule of Civil Procedure 24(a)(2) (28 U.S.C.).

STATEMENT OF THE CASE

The original complaint in this action was filed on December 3, 1973 by fourteen employees and applicants for employment at food processing plants in Northern California (R. 1-18).[1] The complaint named as defendants nine food processing canneries situated in Modesto, California, and the local union responsible for representing plaintiffs under the terms and conditions of the industry-wide collective bargaining agreement, and the Teamsters California State Council of Cannery and Food Processing Unions and California Processors, Inc., the industry-wide bargaining representatives of the unions and employers, respectively. On February 21, 1975, the complaint was amended to include the 74 facilities of the companies covered by the collective bargaining agreement and the unions which represent the employees of said facilities (R. 107-126). The lawsuit was brought as a class action and charged that defendants unlawfully discriminated against the plaintiffs and the plaintiff class by denying females and minority group members opportunities to obtain higher pay and year-round positions within the canning industry (R. 120-121).

Throughout 1974 and early 1975, the defendants engaged in extensive negotiations with plaintiffs in an effort to achieve a mutually satisfactory settlement which could be submitted to the court as a consent decree. Such an agreement was reached and executed on February 19, 1975, and was agreed to and approved by the United States Equal Employment Opportunity Commission on the same date (R. 553).

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[1] "R." references are to the Clerk's record on appeal.

Two groups of individuals who were members of the purported class (hereinafter "pre-decree intervenors") filed motions to intervene on April 28 and June 13, 1975 (R. 129a, 979). On October 28, 1975, the district court ordered that hearings be held regarding the fairness of the proposed settlement, at which time evidence would be presented by proponents, applicants for intervention, and any other interested class members. The court further ordered that notice of the proposed settlement be sent to all class members, posted in each affected plant, and published in newspapers in each of the counties in which a plant was located (R. 550-551).[2]

Six days of hearings were held in February, 1976. Pre-decree intervenors were allowed to participate fully in the hearings and, as a result, the agreement was modified significantly. Following the hearings, the district court approved the modified settlement as a consent decree, effective June 15, 1976, and denied both motions to intervene (R. 970, 1049-1050). Pre-decree intervenors filed a joint notice of appeal on April 30, 1976 (R. 971-972).

On July 2, 1976, a group of employees consisting of eight white males, five minority males, and five females (hereinafter "post-decree intervenors" or "petitioners") moved to intervene and stay the operation of the consent decree (R. 1073-1075). The district court denied the motion on the ground that it had no jurisdiction, and post-decree intervenors

[2]The notice to the class summarizes the seniority provisions of the proposed settlement (R. 555).

filed an appeal from this ruling on July 16, 1976 (R. 1267).

Plaintiffs and defendants submitted to the district court on September 22, 1976 a stipulation which modified the seniority provisions of the consent decree (R. 1275-1277). The proposed modifications had been reached in the course of negotiations regarding the seniority provisions of the collective bargaining agreement. Pre-decree intervenors withdrew their appeal and the court accepted the proposed modifications to the consent decree (R. 1273-1274). On the same day, post-decree intervenors renewed their motion to intervene and stay the consent decree. Both motions were denied (R. 1314-1323).

Post-decree intervenors appealed to the United States Court of Appeals for the Ninth Circuit. The appellate court affirmed the order of the district court on February 1, 1978 and, on April 3, 1978 denied a petition for rehearing. The instant petition was filed on June 29, 1978.

ARGUMENT

It is well established that the issuance of a writ of certiorari is discretionary and should be exercised only under special circumstances. *Durham v. United States,* 401 U.S. 481, 483 (1971).[3] The Court has held that however important an issue may be to the petitioner, certiorari will be denied if the question raised

[3]*Accord, State v. Swift & Co.,* 260 U.S. 146, 151 (1922); *City and County of Denver v. New York Trust Co.,* 229 U.S. 123, 133 (1913); *Hyde v. Shine,* 199 U.S. 62, 85 (1905).

is not of sufficient gravity and general importance, or if there is no conflict between the decisions of federal and state courts, between circuit courts or with prior decisions of this Court. *Fields v. United States,* 205 U.S. 292 (1907); *Forsyth v. Hammond,* 166 U.S. 506, 514 (1897); *Lau Ow Bew v. United States,* 144 U.S. 47 (1892). We show below that the petition fails to establish a conflict between circuit courts or with prior decisions of this Court in parallel situations, nor does it raise a question of sufficient gravity and general importance to warrant review by this Court.

I

THERE IS NO CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR BETWEEN CIRCUIT COURTS

Petitioners moved to intervene of right in this suit under Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C., which provides in part:

> "Rule 24.—INTERVENTION.
>
> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The key issue below was whether petitioners' motion was timely filed. Petitioners cite *United Air Lines, Inc. v. McDonald,* 432 U.S. 385 (1977), *rehearing denied,* ..... U.S. ....., 98 S.Ct. 623 and *Stallworth v. Monsanto Co.,* 558 F.2d 257 (5th Cir. 1977) to support their contention that their motion was timely and that conflict exists between this Court's decision in the *United Air Lines* case and the opinion below, as well as between the Fifth Circuit's decision in *Monsanto* and the decision of the court below. However, the cited cases involved factual situations substantially different from that which exists here,[*] and the holdings there are inapplicable to this case.

In *United Air Lines, Inc. v. McDonald, supra,* the Court found timely a post-judgment motion to intervene filed by a putative class member who sought to appeal from an adverse class determination order. Plaintiffs there unsuccessfully had prosecuted an interlocutory appeal from the order denying class action status to their suit. It was not until after the entry of final judgment that intervenors had notice that plaintiffs did not intend to re-appeal from the class determination. Thus, the decision in *United Air Lines, Inc. v. McDonald, supra,* is inapposite to a post-judgment motion to intervene to relitigate the entire case in district court, especially where ten of the eighteen

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[*]The day before the instant petition was filed, the Court announced its opinion in *Regents of The University of California v. Bakke,* 46 U.S.L.W. 4896 (1978). However, as the Court noted, that suit did not question consent decrees under Title VII, such as the one involved here. 46 U.S.L.W. at 4905 n.41.

intervenors had pre-hearing notice of the pending litigation.[5]

In *Stallworth v. Monsanto Co., supra,* the Fifth Circuit found the trial court had used a vague and incorrect standard for determining when appellants there became aware their interests might be affected by the lawsuit,[6] whereas the court below specified events which constituted reasonable notice to petitioners (Pet. App. A, p. 4).[7] The extensive, publicized industry-wide negotiations and hearings, personal notice to several would-be intervenors and notices posted at places of employment, which the court below found to constitute sufficient notice here, had not occurred in *Monsanto.* Thus, the decision below is not inconsistent with either *United Air Lines, Inc.*

[5]As noted *supra,* p. 4, the five female and five minority male post-decree intervenors are class members and received notice of the proposed settlement and forthcoming hearings. Petitioners have pursued their motion to intervene as a group, making no attempt to distinguish the ten named class members from the eight named non-class members. The fact that nearly 60% of petitioners received individual notice of the settlement proposal prior to the hearings plainly put the entire group on notice long before they moved to intervene. Moreover, having received personal notice, petitioners lack standing to complain that the class notice was published with insufficient frequency or in inappropriate newspapers.

[6]". . . [T]he district court's finding that the appellants were dilatory in applying for intervention is based upon an improper legal standard and without support in the record. The court mistakenly used an unspecified time when it supposed that the appellants must have learned of the pendency of the action rather than the time when they knew or should have known of their interest in the action as its starting point in assessing whether they acted properly to protect themselves." *Monsanto, supra,* 558 F.2d at 266-267.

[7]"Pet." references are to the petition.

v. McDonald, supra, or *Stallworth v. Monsanto Co., supra.*

The case most similar to the one at bar is *Equal Employment Opportunity Commission v. American Tel. & Tel. Co.,* 556 F.2d 167 (3rd Cir. 1977),[8] where the Court recently denied certiorari *sub nom. Communications Workers of America v. Equal Employment Opportunity Commission,* 46 U.S.L.W. 3801 (1978). Because of the unique facts of this case, the issue raised by the petition here likewise does not warrant review.

II

THE DECISION BELOW IS CORRECT

It is generally accepted that intervention must be denied if it is untimely. Timeliness is determined by an evaluation of all of the circumstances, and the judgment of the trial court should not be disturbed on appeal absent an abuse of discretion. *NAACP v. New York,* 413 U.S. 345, 365-366 (1973); *United States v. United States Steel Corp.,* 548 F.2d 1232, 1235 (5th Cir. 1977). Intervention after entry of final judgment is granted only upon a strong showing of entitlement and justification for failure to request intervention sooner. *United States v. Blue Chip Stamp Co.,* 272 F.Supp. 432 (C.D. Cal. 1967), *aff'd sub*

[8]There, the Third Circuit held that the federal interest in remedying the effects of employment discrimination is so substantial that relief which adversely affects third parties does not violate the equal protection guarantee inherent in the due process clause of the Fifth Amendment. *E.E.O.C. v. A.T.&T., supra,* 556 F.2d at 179-180.

nom. Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968) *rehearing denied* 390 U.S. 975; *United States v. Associated Milk Producers,* 534 F.2d 113, 115 (8th Cir. 1976).

The trial and circuit courts found that petitioners had notice in sufficient time to intervene before the entry of the decree, but chose not to do so (Pet. App. A, p. 4; Pet. App. B, pp. 77-78). Petitioners do not deny pre-decree knowledge of the proceedings; rather, they suggest they did not know their interests would be adversely affected (Pet. 15). The court below properly rejected this contention, noting ". . . surely they knew the risks" of failing to act (Pet. App. A., p. 4).

Petitioners continue to suggest that the district court denied them due process of law by failing to require that all cannery employees be served with formal notice of the proceedings between the parties in this suit (Pet. 25-27). However, petitioners received forewarning of the proceedings through the notices that were posted in each plant and sent to every member of the class (including ten of the named intervenors), and the publicity generated by the settlement negotations and subsequent hearings.

The trial and appellate courts fully considered the remaining contentions of petitioners. Both courts concluded that petitioners had failed to satisfy the requirements of Federal Rule of Civil Procedure 24(a)(2); and their findings are completely justified by the facts described above. Moreover, the members

of the class who have been receiving the benefits of the decree for over two years would be prejudiced greatly by an interruption of the remedies they fought so hard to obtain. Thus, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, August 15, 1978.

Respectfully submitted,
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